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No. OFFICE OF THE CLERK

In The

Supreme Court of the United States

YVETTE PATTON,

Petitioner,

v.

JOSEPH CRAIG LEMOINE, ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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40 pp

QUESTIONS PRESENTED

I.

Whether the United States Court of Appeals, Fifth Circuit, and the Western District of Louisiana have Jurisdiction to review petitioner's claim, which were violations of the United States Constitution and the State of Louisiana?

II.

Does Res Judicata apply where the merits have not been reached by the reviewing courts?

III.

Whether the Court of Appeals, Third Circuit, violated the Louisiana Constitution 1974 Article V, 10(b)?

LIST OF ALL PARTIES

1. Yvette Patton, Plaintiff-Petitioner, Alfred Patton, Jr., Shelton Frazier and Jessica Perry

2. Joseph Craig Lemoine and Louisiana Farm Bureau Casualty Insurance Company, Defendants-Respondents

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TO THE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

COMES NOW the petitioner, Yvett Patton, Pro Se, and pursuant to Rule 12, files this petition for a writ of certiorari to the Court of Appeals for the Fifth Circuit of Louisiana, at Zwolle, Louisiana, and in support thereof would show the Court as follows:

LOWER COURT'S OPINION

The Court of Appeals, Third Circuit, affirmed in part reversed in part, and remanded in a published opinion on November 02, 2000. Rehearing was denied on November 14, 2000. On April 12, 2001, Louisiana Supreme Court denied review without a written opinion. On May 25, 2001, Louisiana Supreme Court denied reconsideration without a written opinion. On December 07, 2001, The Western District of Louisiana denied review in its Report and Recommendation. On January 23, 2002, Western District of Louisiana granted motion to dismiss. The Court of Appeals for The Fifth Circuit denied review in an unpublished opinion on July 19, 2002.

BASIS FOR JURISDICTION

1. A final opinion by the Western District of Louisiana was delivered on January 23, 2002. A petition for review, timely filed on May 12, 2002, was refused by the Court of Appeals, Fifth Circuit on July 19, 2002.

2. Petitioner asks this Court to review the opinion of the Court of Appeals with respect to questions of law arising under the United States Constitution.

3. This Court has jurisdiction pursuant to 28 U.S.C. 1254 and 28 U.S.C. 1257(3).

4. This petition is timely filed on or before December 24, 2002.

CONSTITUTIONAL PROVISIONS RELIED UPON

The First Amendment to the United States Constitution reads:

> "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peacefully to assemble and to petition the government for a redress of grievances."

The Seventh Amendment to the United States Constitution, reads:

> "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved and no fact tried by a jury shall be otherwise re-examined in any court of the United States thus according to the rules of the common law."

The Fourteenth Amendment to the United States Constitution, Section 1, reads:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State

wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

On July 08, 1993, the petitioner, Yvette P. Patton was injured in an automobile accident on Louisiana Hwy. 6, in Natchitoches Parish Louisiana. The petitioner was rear ended by the negligence of the respondent, Joseph Craig Lemoine. The petitioner sustained three (3) bulging discs as a result of this accident, that continue to cause severe pain. The petitioner sought civil action against respondents, Joseph Craig Lemoine, and Louisiana Farm Bureau Casualty Insurance Company. The petitioner was involved in three (3) other accidents during this present litigation. The petitioner was a passenger in two of those accidents. No new injuries were sustained. The petitioner was represented by several attorneys during this matter. Attorney Fred Smith represented petitioner during trial.

A jury trial was set on October 25, 1999. The respondents admitted liability and stated this matter was strictly to assess damages. The petitioner had subpoenaed two (2) expert witnesses to testify. They were, Dr. Richard Galloway, a vocational rehabilitation expert, and Dr. Carroll Aby, an economist. They both were accepted by the court and respondents, three days prior to trial in hearing on motion to quash. *See* (App. 21.). The first day of trial, petitioner called Dr. Calloway to testify. The respondents

objected, it was discussed and sustained by the court. The court also dismissed Dr. Carroll Aby during recess of trial in his chambers. The reasons were not entered in the record.

The court gave an erroneous instruction to the jury concerning the reasons for other health care providers not being called to testify on behalf of the petitioner. That issue was reversed in part by the Third Circuit Court of appeals (App. 9). The jury awarded $20,000.00 for general damages. $5,000.00 for past medical expenses, two (2) awards of $1,500.00 for Alfred Patton Jr., and Shelton Frazier, one (1) award of $2,000.00 to Jessica Perry for loss of consortium. Petitioner filed a motion for new trial which was denied. Petitioner appealed to the Third Circuit Court of Appeals. Three of the errors alleged were the dismissal of the expert witnesses and the jury instruction. The Third Circuit rendered a decision on November 02, 2000.

The Court of Appeals Third Circuit affirmed in part, reversed in part, and remanded the judgment. Rehearing was denied on December 12, 2000. Petitioner appealed to the Louisiana Supreme Court. The application was denied on April 12, 2001; no reasons were given. Rehearing was denied on May 25, 2001. Petitioner appealed to the Western District of Louisiana. The magistrate Judge Report and Recommendation was rendered on December 07, 2001. The petition was denied, the Rooker-Feldman Doctrine was asserted. Judgment was rendered dismissing motion on January 23, 2002. Within 30 days of the Judge's findings, petitioner filed a "Notice of Appeal" to appeal to the Fifth Circuit Court of Appeal. Petitioner thereafter sought relief in the Fifth Circuit Court of Appeal. On July

19, 2002, judgment was entered denying petitioner's appeal asserting the Rooker-Feldman Doctrine.

REASONS FOR REVIEW

I.

Whether the United States Court of Appeals, Fifth Circuit and the Western District of Louisiana have Jurisdiction to review petitioner's claim, which were violations of the United States Constitution and the State of Louisiana by mis-applying *The Rooker-Feldman* Doctrine?

Petitioner contends the United States Court of Appeals for the Fifth Circuit, and the Western District of Louisiana, made an erroneous decision and "mis-application" of Law. The court relied on *Weekly v. Morrow,* 204 F.3d 613, 615 (5th Cir. 2000). The Rooker-Feldman Doctrine stands for the proposition that constitution issues arising and litigated in state courts can not thereafter become the subject of an original lawsuit in federal courts. *See United States v. Owens,* 54 F.3d 271, 275 (6th Cir. 1995). The Rooker-Feldman Doctrine is derived from two lawsuits. The first is *Rooker v. Fidelity Trust Co.,* 263 U.S. 413 (1923), in which the petitioner filed suit in federal court to have a judgment of an Indian state court declared null and void and to obtain other relief dependent upon that outcome. *See Rooker,* 263 U.S. at 414. In that case, the petitioner claimed that the constitutional issues first litigated in state court were decided contrary to the United States Constitution. *See id.* at 415, the district court held it was without jurisdiction, and the petitioner appealed directly to the United States Supreme Court. *See id.*

The Supreme Court affirmed and upheld the dismissal for lack of jurisdiction. The court further opined that if the state court's decision was incorrect, the judgment was not void but open to reversal or modification in an appellate proceeding. *See id.* If the state court's decision was not "reversed" or "modified," it was an effective and conclusive adjudication, and no court of the United States other than the Supreme Court could entertain a proceeding to reverse or modify the judgment for [those] errors. *Id.* The petitioner contends her case falls within the ruling of the U.S. Supreme Court in *Rooker v. Fidelity*, 263 U.S. 413 (1923) and *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983) cases. The U.S. Supreme Court stated, "if the state court's decision was not reversed or modified, it was effective and conclusive. . . . " *Id.* This court's ruling, based on the exception of a case being reversed, gives the petitioner jurisdiction because the case was reversed in part. The Fifth Circuit or Western District of Louisiana has jurisdiction to review this case.

II.

Does Res Judicata apply where the merits have not been reached by the reviewing courts?

The petitioner contends that Res Judicata does not apply in the instant case. The state court did not reach all of the merits on the claims presented by petitioner. Petitioner alleged in her appeal to the courts below that the state courts, especially the Third Circuit Court of Appeals for the State of Louisiana, did not reach the merits of their claim concerning the dismissal of two expert witnesses, Dr. Carroll Aby, an economist, and Dr. Richard Galloway, a vocational rehabilitation expert.

The petitioner alleges the state court violated Fed. R. Civ. P. 13, 14, 18, 20, and 24 which gave the petitioner the latitude to plead all their possible claims against opposing parties within the limits of proper pleading. For the trial court to identify Dr. Aby as a witness to testify for the petitioner in a hearing on motion to quash two days prior to trial, then excuse him during recess of trial in his chambers without allowing testimony, and not allowing the court's reasons to be stated in the record, subjected the petitioner's case to prejudice with a "selective" outcome.

The petitioner is not attempting to re-litigate an issue in a second claim. *Federated Department Stores Inc. v. Moitie*, 452 U.S. 394, 398 (1981). The petitioner, from the first stage of appeals, has contested the actions of the state court of dismissing the witnesses. The petitioner's 7th Amendment right, which grants protection against unfair decisions in civil cases and also the possibility of a different decision if the jury fails in its duty, has been violated along with the 14th Amendment right which grants due process of law.

III.

Whether the Court of Appeals, Third Circuit, violated the La. Const. 1974 Article V 10(b)?

The appellate courts of the state need not defer entirely to the fact finder's determinations; rather, they are empowered and under a constitutional mandate to review the record in its entirety. *See* La. Const. 1974 Art. V 10(b). *Ferrell*, 94-1252, at P. 5, 650 So.2d at 746 (1995). The petitioner contends the Third Circuit Court of Appeals violated this amendment. The court did not review the case in its entirety. The court stated there was no pre-trial

ruling on Dr. Carroll Aby and that as a result, there was nothing for them to review.

Petitioner contends there was a ruling three days prior to trial. Dr. Carroll Aby was named and accepted by the court and the respondents in hearing on "Motion to Quash" other health care providers. (65-336,753). The motion validates the argument that the Third Circuit Court of Appeals did not review the record in its entirety and violated La. Const. 1974 Art. V 10(b). The Sixth Circuit applied the *Rooker-Feldman* doctrine in *Patmon v. Michigan Supreme Court*, 224 F.3d 504 (2000). In *Patmon*, the Sixth Circuit reasoned that if a petitioner's constitutional claims are "inextricably intertwined" with the state judicial determinations of his case, a review of the constitutional claims would require review of the state court proceedings and violate the *Rooker-Feldman* doctrine. *Patmon*, 224 F.3d at 509.

Petitioner avers that the respondents will not be prejudiced by this court granting a writ of certiorari to review the state court's ruling. Petitioner contends, even though this matter did not come directly from the state court, these issues presented herein are still preserved for review and petitioner respectfully asks to be granted certiorari to present these issues.

CONCLUSION

Wherefore, the petitioner prays that this court grant the writ of certiorari as to all three questions in this case.

Respectfully submitted,

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Pro Se

APPENDIX

1. Fifth Circuit Court of Appeals Memorandum Order July 19, 2002.....App. 1

2. United States District Court Judge Ruling January 23, 2002.....App. 3

3. United States District Court Report and Recommendation December 07, 2001.....App. 5

4. Louisiana Supreme Court Ruling April 12, 2001.....App. 8

5. Third Circuit Court Of Appeals, State of Louisiana Ruling November 02, 2000.....App. 9

6. Tenth Judicial District Court Hearing on Motion to Quash October 22, 1999.....App. 21

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 02-30173
Summary Calendar

YVETTE P. PATTON,

Plaintiff-Appellant,

versus

JOSEPH CRAIG LEMOINE,

Defendant-Appellee.

Appeal from the United States District Court
(For the Western District of Louisiana)
(Filed Jul. 19, 2002)

(01-CV-1722)

Before HIGGINBOTHAM, WIENER, and BARKSDALE, Circuit Judges.

PER CURIAM:*

Patton appeals the district court's grant of Lemoine's motion to dismiss for lack of subject matter jurisdiction.

---

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

She argues that federal district courts have jurisdiction to review state court decisions. She is mistaken. Federal district courts, as courts of original jurisdiction, lack appellate jurisdiction to review, modify, or nullify final orders of state courts.[1] AFFIRMED.

---

[1] *Weekly v. Morrow*, 204 F.3d 613, 615 (5th Cir. 2000).

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION

YVETTE P. PATTON, ET AL.

versus

JOSEPH CRAIG LEMOINE, ET AL.

CIVIL ACTION NO. 01-1722

JUDGE WALTER

MAGISTRATE JUDGE PAYNE

(Filed Jan. 23, 2002)

JUDGMENT

For the reasons assigned in the Report and Recommendation of the Magistrate Judge previously filed herein, and having thoroughly reviewed the record, including the written objections filed, and concurring with the findings of the Magistrate Judge under the applicable law;

IT IS ORDERED that the Motion to Dismiss (Doc. 2) be **GRANTED** and this civil action be **DISMISSED WITHOUT PREJUDICE** for lack of subject matter jurisdiction.

THUS DONE AND SIGNED at Shreveport, Louisiana, this the 18th day of January, 2002.

/s/ Donald E. Walter
DONALD E. WALTER
UNITED STATES DISTRICT JUDGE

JUDGMENT ENTERED

1-23-02

BY Shannon McHanes

COPY Patton

Williams

APPENDIX C

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION

YVETTE P. PATTON, ET AL.

versus

JOSEPH CRAIG LEMOINE, ET AL.

CIVIL ACTION NO. 01-1722

JUDGE WALTER

MAGISTRATE JUDGE PAYNE

(Filed Dec. 7, 2001)

REPORT AND RECOMMENDATION

Yvette Patton ("Plaintiff") was injured in an automobile accident and filed suit for related damages in state court. A jury awarded the damages in her favor. The decision was appealed through the Louisiana court system. *See Patton v. Lemoine*, 776 So.2d 513 (La. App. 3d Cir. 2000), *writ denied*, 789 So.2d 591 (La. 2001). The Supreme Court of Louisiana also denied a request for reconsideration at 792 So.2d 747 (La. May 25, 2001). A few months later, Plaintiff filed with this court what she styles an "Original Appeal" from the state court decisions. The appeal is in the form of a brief that challenges decisions of the state courts regarding evidentiary rulings, jury instructions, appellate review standards and the like. Before the court is a Motion to Dismiss (Doc. 2) filed by defendant Joseph Lemoine. The motion must be granted.

The Supreme Court has definitively established, in what has become known as the *Rooker-Feldman* doctrine,

that federal district courts, as courts of original jurisdiction, lack appellate jurisdiction to review, modify or nullify final orders of state courts. *Weekly v. Morrow*, 204 F.3d 613, 615 (5th Cir. 2000). If a state trial court errs, the judgment is to be reviewed and corrected by the appropriate state appellate court. Recourse to the federal level is then limited to an application for a writ of certiorari to the United States Supreme Court. *Id. See also Hagerty v. Succession of Clement*, 749 F.2d 217, 220 (5th Cir. 1984) ("A plaintiff may not seek a reversal of a state court judgment simply by casting his complaint in the form of a civil rights action."). Plaintiff's appeal to this court is plainly barred by the *Rooker-Feldman* doctrine.

Accordingly;

IT IS RECOMMENDED that the Motion to Dismiss (Doc. 2) be **GRANTED** and this civil action be **DISMISSED WITHOUT PREJUDICE** for lack of subject matter jurisdiction.

Objections

Under the provisions of 28 U.S.C. §636(b)(1)(C) and Fed.R.Civ. Proc. 72(b), parties aggrieved by this recommendation have ten (10) business days from service of this report and recommendation to file specific, written objections with the Clerk of Court, unless an extension of time is granted under Fed.R.Civ.P. 6(b). A party may respond to another party's objections within ten (10) days after being served with a copy thereof. Counsel are directed to furnish a courtesy copy of any objections or responses to the District Judge at the time of filing.

A party's failure to file written objections to the proposed findings, conclusions and recommendation set forth above, within 10 days after being served with a copy, shall bar that party, except upon grounds of plain error, from attacking on appeal the unobjected-to proposed factual findings and legal conclusions accepted by the district court. *See Douglass v. U.S.A.A.*, 79 F.3d 1415 (5th Cir. 1996) (en banc).

THUS DONE AND SIGNED at Shreveport, Louisiana, this the 6th day of Dec., 2001.

/s/ Roy S. Payne
ROY S. PAYNE
UNITED STATES MAGISTRATE JUDGE

cc'd to RSP; Judge Walter

APPENDIX D

The Supreme Court of the State of Louisiana

YVETTE P. PATTON, ET AL.

VS. NO. 2001-C-0320

JOSEPH CRAIG LEMOINE, ET AL.

IN RE: Patton, Yvette P. etal [sic]; – Plaintiff; Applying for Writ of Certiorari and/or Review, Parish of Natchitoches, 10th Judicial District Court Div. B, Nos. 65,336; to the Court of Appeal, Third Circuit, No. 00-765

April 12, 2001

Denied.

JPV

PFC

CDK

BJJ

CDT

JTK

PCC

Supreme Court of Louisiana
April 12, 2001

/s/ [Illegible]
Deputy Clerk of Court
For the Court

APPENDIX E

YVETTE P. PATTON, et al.	*	**NUMBER 00-765**
	*	
VERSUS	*	**COURT OF APPEAL**
	*	**THIRD CIRCUIT**
JOSEPH CRAIG LEMOINE, et al.	*	**STATE OF LOUISIANA**
	*	

* * *

APPEAL FROM THE
TENTH JUDICIAL DISTRICT COURT,
PARISH OF NATCHITOCHES, NO. 65,336,
HONORABLE JOHN B. WHITAKER,
DISTRICT JUDGE

* * *

MICHAEL G. SULLIVAN
JUDGE

* * *

(Filed November 2, 2000)

(Court composed of Billie Colombaro Woodard, Marc T. Amy, and Michael G. Sullivan, Judges.)

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AFFIRMED IN PART; REVERSED IN PART, AND REMANDED WITH INSTRUCTIONS.

SULLIVAN, Judge.

Yvette Patton appeals the trial court's judgment which awarded her general damages in the amount of $20,000.00 and past medical expenses in the amount of $5,000.00. The judgment also awarded her children, Alfred, Shelton, and Jessica, damages for loss of consortium in the amounts of $1,500.00, $1,500.00, and $2,000.00, respectively. These awards have not been appealed. For the following reasons, we affirm in part, reverse in part, and remand for further proceedings.

Facts

On July 8, 1993, Ms. Patton was injured when the automobile she was driving on Louisiana Highway 6 in Natchitoches Parish was rear-ended by an automobile driven by Joseph Lemoine. The accident occurred when Ms. Patton was preparing to make a left-hand turn off of the highway. After the accident, Ms. Patton sought treatment from her physician, Dr. Garland Miller, a general practitioner, for pain in her neck and lower back. During the course of his treatment, Dr. Miller had Ms. Patton undergo MRIs of her neck and lower back, which revealed

bulging discs at C3-4, C4-5, and L5-S1. According to Dr. Miller, most of her complaints concerned her back. Ms. Patton also sought treatment from other physicians following the accident; however, for reasons set forth below, only Dr. Miller testified for trial purposes.

Ms. Patton was involved in three additional automobile accidents following the accident with Mr. Lemoine. On September 24, 1994, she was involved in another rear-end collision. She settled her claim against the driver of the car that hit her for $10,000.00 in October 1998. She was also involved in accidents on June 8, 1995 and September 5, 1995. Ms. Patton testified that her pain from the injuries of the July 8, 1993 accident never subsided. She indicated that each subsequent accident exacerbated her pain for a period of time; however, her pain level returned to the prior level shortly thereafter. Dr. Miller was of the opinion that the subsequent accidents aggravated Ms. Patton's pre-existing pain caused by the bulging discs. He testified that he thought the pain from the first accident was more or less permanent and had stabilized prior to the subsequent accidents. Her pain increased after each subsequent accident but only for a period of time.

Dr. Gordon Mead, an orthopedist, examined Ms. Patton at the request of Defendants. In his opinion, the bulging discs were not causing pain as Ms. Patton complained, explaining that studies have shown that many people have bulging discs, yet they do not have pain. According to Dr. Mead, there were no objective findings during his examination which substantiated Ms. Patton's complaints of pain.

Ms. Patton sued Mr. Lemoine and his insurer, Farm Bureau Casualty Insurance Company, for the injuries she

suffered as a result of the accident. She sought loss of consortium damages for her children. Mr. Lemoine and Farm Bureau admitted liability, and on October 25 and 26, 1999, a jury trial was held to determine damages.

After the verdict, Ms. Patton filed a motion for new trial, which was denied after a hearing. Three attorneys who had formerly represented Ms. Patton in this matter, a health care provider who had rendered treatment to Ms. Patton as a result of the accident, and a financial institution intervened to assert claims for amounts Ms. Patton allegedly owed them. After a hearing on the interventions, a judgment was rendered recognizing the claims of all of the intervenors. Ms. Patton appeals, assigning five errors.

Standard of Review

A jury's finding of fact may not be reversed absent manifest error or unless clearly wrong. *Stobart v. State, Through Dep't of Transp. and Dev.*, 617 So.2d 880 (La. 4/12/93). The reviewing court must do more than simply review the record for some evidence which supports or controverts the trial court's findings; it must instead review the record in its entirety to determine whether the trial court's finding was clearly wrong or manifestly erroneous. The issue to be resolved by a reviewing court is not whether the trier of fact was right or wrong, but whether the fact finder's conclusion was a reasonable one. *Id.* The reviewing court must always keep in mind that "if the trial court or jury's findings are reasonable in light of the record reviewed in its entirety, the court of appeal may not reverse, even if convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently." *Id.* at 882-883, *citing Housley v. Cerise*, 579

So.2d 973 (La.1991) (quoting *Sistler v. Liberty Mut. Ins. Co.*, 558 So.2d 1106, 1112 (La.1990)).

While factual determinations by the trier of fact are given great deference on appeal, if the trier of fact's decision was based on an erroneous application of law, rather than a valid exercise of discretion, the decision is not entitled to the deference it would otherwise enjoy. *Lasha v. Olin Corp.*, 625 So.2d 1002 (La.1993); *We Sell Used Cars, Inc. v. United Nat'l Ins. Co.*, 30,671 (La.App. 2 Cir. 6/24/98), 715 So.2d 656.

Discussion

Expert Witnesses

Ms. Patton first complains that the trial court committed error in refusing to allow two expert witnesses to testify on her behalf. The two witnesses at issue are Richard H. Galloway, M.S.W., Ph.D., a vocation rehabilitation expert, and Carroll Dordan Aby, Jr., an economist. As noted previously, Ms. Patton was represented by different attorneys during the course of this litigation. At one point, she was unrepresented and proceeded in proper person. During that time period, Ms. Patton filed a response to a pre-trial order and identified five witnesses that she would call to testify at trial: Dr. Miller, Dr. Galloway, Mr. Aby, Dr. Arthur Gleason, III, and Alfred Patton, Jr. After filing the pre-trial order, Ms. Patton notified defense counsel by letter that she would not be calling Dr. Gleason to testify at trial.

Ms. Patton then obtained new representation who, in preparation for trial, issued subpoenas to Dr. Gleason, David Horner, D.C., Dr. John P. Sandifer, Dr. W.W. Fox, Dr. Brent Boudreaux, and Dr. Andrew F. Marsala. Defense

counsel filed a motion to quash the subpoenas on the basis of Ms. Patton's representation that she would not call Dr. Gleason to testify at trial and her failure to list the remaining witnesses on her pre-trial order response. At the hearing on the motion to quash, Ms. Patton's attorney informed the trial court that he was withdrawing the subpoenas issued to all witnesses identified in the motion to quash.

During the trial, Defendants objected to Dr. Galloway's testimony on the basis that there was no evidence in the record that served as the foundation for his testimony. Counsel questioned Dr. Galloway regarding the foundation for his testimony and Dr. Galloway confirmed that his testimony would be based, in part, upon the records of Ms. Patton's medical treatment by Dr. Gleason, Dr. Horner, Dr. Nabil Moufarrej, a neurologist, and Dr. Sandifer, as well as a functional capacity evaluation by Richard Guidroz, a physical therapist. Defendants objected to Dr. Galloway being allowed to testify because the foundation of his testimony was inadmissible hearsay, as none of the named health care providers were going to be called to testify at trial and none of their records were going to be introduced at the trial. The trial court sustained the objection.

La. Code Civ.P. art. 1636 provides in pertinent part:

> A. When the court rules against the admissibility of any evidence, it shall either permit the party offering such evidence to make a complete record thereof, or permit the party to make a statement setting forth the nature of the evidence.

The purpose of a proffer is to preserve evidence excluded by the trial court so that the evidence is available for appellate review. *McLean v. Hunter*, 495 So.2d 1298 (La.1986). Ms. Patton did not proffer Dr. Galloway's testimony, so we have no way of knowing what his testimony would have been. Accordingly, she is precluded from complaining that his testimony was excluded. *Fontenot v. Fontenot*, 621 So.2d 843 (La.App.3 Cir. 1993), *rev'd on other grounds*, 93-2479 (La. 4/11/94); 635 So.2d 219.

With regard to Mr. Aby, Ms. Patton did not call him as a witness during the trial, and there is no evidence in the record of a pre-trial ruling by the trial court regarding him as a trial witness. Accordingly, there is nothing for us to review. This assignment is without merit.

Attorney Fees

Ms. Patton assigned as error the trial court's recognition of an attorney's intervention for a fee without a signed contract. For reasons other than those cited by Ms. Patton, we find that the trial court's recognition of the three attorneys' claims for fees was error.

As previously noted, Ms. Patton was represented by a number of attorneys during the course of this litigation. Three of her former attorneys, Christopher Whittington, C. Rodney Harrington, and W. Fred Smith, intervened in this matter seeking to collect their fees and expenses. After the trial court signed the judgment, Defendants deposited the sum of $44,805.00 into the registry of the court, which represents the principal amount of the judgment and accumulated legal interest.

At the hearing on the interventions, Ms. Patton consented to two of her former attorneys being paid but objected to the third being paid. After the hearing, the trial court issued a judgment awarding attorney fees and expenses in the total amount of $24,684.70, or fifty-five percent of the judgment amount, to the three intervening attorneys.

In determining the fee a plaintiff was obligated to pay his attorney who was discharged without cause, the Louisiana Supreme Court held in *Saucier v. Hayes Dairy Products, Inc.*, 373 So.2d 102, 118 (La. 1978):

> Considering the peculiar nature of the contingency fee contract, its social importance, and its potential for abuse as well, in light of our duty to enforce the Disciplinary Rules, we conclude that only one contingency fee should be paid by the client, the amount of the fee to be determined according to the highest ethical contingency percentage to which the client contractually agreed in any of the contingency fee contracts which he executed. Further, that fee should in turn be allocated between or among the various attorneys involved in handling the claim in question, such fee apportionment to be on the basis of factors which are set forth in the Code of Professional Responsibility.

This holding was confirmed in *O'Rourke v. Cairns*, 95-3054, p. 11 (La. 11/25/96); 683 So.2d 697, 704, where the supreme court held that the *Saucier* rule also applied to cases of discharge with cause, stating "[t]his rule serves to confine client exposure to no more than one contingency fee in both with and without cause situations."

Ms. Patton contracted to pay Mr. Harrington forty percent of any amount recovered by him on her behalf. She contracted to pay Mr. Whittington and Mr. Smith smaller percentages. Accordingly, it was legal error for the trial court to award a judgment for attorney fees which exceeded the forty percent contingency fee Ms. Patton contracted to pay Mr. Harrington. On remand of this matter, Ms. Patton cannot be made to pay more than the "highest ethical contingency" fee for which she contracted. The fee should then be "allocated between or among the various attorneys involved in handling the claim in question, such apportionment to be on the basis of factors which are set forth in the Code of Professional Responsibility." *Saucier,* 373 So.2d at 118.

Jury Instruction

Ms. Patton assigned as error the trial court's instruction to the jury as follows:

> You're further instructed if you find that Ms. Patton has failed to call as witnesses, doctors or other health care providers who treated Ms. Patton and she has further failed to give a reasonable explanation for this failure then it is presumed that these doctors and other health care providers' testimony would have been against Ms. Patton.

In *Shelvin v. Waste Management, Inc.,* 580 So.2d 1022, 1027 (La.App. 3 Cir. 1991), this court addressed the adverse presumption that the jury was instructed to apply in this case:

> Failure of a party to call a witness creates a presumption that the witness's testimony would

> have been unfavorable, where that party has the burden of proof, or where that party has some control over, or a close relationship with the witness. The presumption does not apply where the witness was equally available to either party. *Fortenberry v. Fortenberry,* 432 So.2d 1125 (La.App. 3d Cir.1983).

See also Augustus v. St. Mary Parish Sch. Bd., 95-2498 (La.App. 1 Cir.6/28/96); 676 So.2d 1144; *Hernandez v. Schwegmann Giant Supermarkets,* 464 So.2d 902 (La.App. 4 Cir. 1985).

None of the health care providers who treated Ms. Patton, but were not called to testify at trial, were under her control and all of them were equally available to Defendants; thus, it was error for this instruction to be given to the jury. We must review this error as we would any other relevant evidence presented and determine whether the instruction, compared to the record as a whole, substantially affected the outcome of the case. In other words, was the error so prejudicial that it warrants reversal of the judgment? *Stevens v. Hartford Ins. Co. of the Midwest,* 94-523 (La.App. 3 Cir. 11/2/94); 646 So.2d 981, *writ denied,* 95-311 (La. 3/24/95); 651 So.2d 296.

Our review of this instruction in the context of this case leads us to conclude that the error does not warrant reversal. On the issue of general damages, the jury had the following evidence to consider: 1) the testimony of Ms. Patton, Dr. Miller, and Dr. Mead, and 2) three subsequent accidents for which Ms. Patton sought medical treatment and, in at least one instance, received monetary reparations. While the testimony of Ms. Patton and Dr. Miller, a general practitioner, was that her injuries in this accident were significant and caused her much pain, Dr. Mead, a

specialist, discounted their testimony. In the jury's view, the subsequent accidents may have further discounted Ms. Patton's and Dr. Miller's testimony. In light of all of the evidence, we cannot say that the erroneous instruction had a substantial effect on the outcome of the matter.

General Damages

Finally, Ms. Patton assigns as error the amount of general damages awarded to her by the jury. The standard of review for damage awards is the abuse of discretion standard. It requires that we determine whether the award for the particular injuries and their effects on the particular plaintiff under the particular circumstances is a clear abuse of the much [sic] discretion of the trier of fact. Only after such a determination of an abuse of discretion is made, should we resort to prior awards for the purpose of determining the highest or lowest point which is reasonably within that discretion. *Youn v. Maritime Overseas Corp.*, 623 So.2d 1257 (La.1993), *cert. denied,* 510 U.S. 1114, 114 S.Ct. 1059 (1994).

For the reasons set forth in the preceding discussion, we cannot say that the jury abused its discretion with respect to the damages it awarded Ms. Patton. This assignment of error is without merit.

Pauper Status

Ms. Patton also assigned as error the trial court's denial of pauper status after January 13, 2000, but did not brief it on appeal. In accordance with rule 2-12.4 of the Uniform Rules of Louisiana Courts of Appeal, we deem this assignment abandoned.

Decree

The judgment of the trial court is affirmed in all respects, except for the apportionment of attorney fees. This matter is remanded to the trial court for reapportionment of attorney fees in conformity with the mandates of *Saucier*, 373 So.2d 102, and *O'Rourke*, 683 So.2d 697. All costs associated with the apportionment of attorney fees are assessed to the intervening attorneys. Costs of this appeal are assessed fifty percent to Yvette Patton and fifty percent to the intervening attorneys.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED FOR PROCEEDINGS IN ACCORDANCE WITH THE INSTRUCTIONS HEREIN.

APPENDIX F

October 22, 1999

Friday, October 22, 1999 at 3:00 p.m., the 10th Judicial District Court opened pursuant to adjournment. Present and presiding were the HONORABLE JOHN B. WHITAKER, JUDGE; Robert Brossette & M.C. McGaskey, bailiffs; Betsy Cook, Deputy Clerk of Court and Brenda Honaker, Court Reporter

CRIMINAL COURT HEARD. (SEE CRIMINAL MINUTE BOOK)

Yvette Patton, et al vs Joseph Craig Lamoine, et al. **MOTION TO QUASH**.

Mr. Fred Smith, counsel for plaintiffs, present; Mr. Joe Payne Williams, counsel for defendants, present. Plaintiffs and Defendants were not present.

Mr. Williams was the mover in this Motion.

Mr. Smith advised court he has just discussed this matter with Mr. Williams and Ms. Patton.

Mr. Smith with respect to the calling of the witnesses and they're listed as Dr. Gleason, Dr. Horner, Dr. Sandifer, Dr. Fox, Dr. Boudreaux, and Dr. (inaudible).

Mr. Smith stated they would withdraw calling any of those particular witnesses.

Mr. Smith stated with respect to Dr. Gleason, there's just one question in there they would addressing [sic] that they haven't quite resolved that. Mr. Smith stated with respect to the others, that it has been resolved. Mr. Smith stated

that's the witnesses numbered B through F. Mr. Smith that would be A as well – all of them are being withdrawn.

BY THE COURT: You're withdrawing your subpoenaes to everybody or to just a part of them.

Mr. Smith stated he's withdrawing his subpoenaes to all that are listed in the Motion to Quash.

BY THE COURT: So, you're going to withdraw them and that makes the Motion to Quash moot. Is that correct?

Mr. Smith stated that was correct.

Mr. Smith stated there was a Motion that he did file this morning.

BY THE COURT: Alright, I've got that before me.

Mr. Smith stated that was special process serving and stated that he understood that the Court was withholding on that – doing the order on that – pending this matter.

BY THE COURT: Were those the same people that were listed on the . . .

Mr. Smith stated it was.

Mr. Smith stated that in addition to those witnesses being listed there, there is one Dr. Aby. Mr. Smith stated they have had some contact with Dr. Aby.

Mr. Smith wasn't sure if Dr. Aby has actually been served, but in the event that he hasn't, Mr. Smith does have someone in a position to serve Dr. Aby.

Mr. Smith stated Mr. Williams does not object to Dr. Aby being called.

BY THE COURT: Dr. Aby will be called as an expert witness.

Mr. Smith stated that was correct.

BY THE COURT: He'll be your witness.

Mr. Smith stated that was correct.

BY THE COURT: So, you don't even need a subpoena for him because what's going to happen – he charges five or six hundred dollars to testify and that's all he's looking for. He's not looking for a subpoena. I mean you might need to do that.

But, you have no objection to Dr. Aby?

Mr. Williams stated he has no objection to Dr. Aby and stated they listed Dr. Aby in a pre-trial response and stated they did not object to Dr. Aby.

BY THE COURT: Alright. So, that resolves everything that was.

Mr. Williams stated that was everything.

Mr. Williams stated it would be nine o'clock Monday morning.

BY THE COURT: Nine o'clock Monday morning.

CASE SCHEDULED FOR JURY TRIAL BEGINNING MONDAY MORNING, OCTOBER 25, 1999 AT 9:00 A.M. (JURY TRIAL WAS HEARD IN THIS MATTER ON OCTOBER 25 AND OCTOBER 26, 1999)

Whereupon Court adjourned.

Approved,
/s/ John B. Whitaker
JOHN B. WHITAKER JUDGE